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In the Supreme Court of the United States

OCTOBER TERM, 1982

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
PETITIONERS

v.

TERRI LEE HALDERMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who failed to obey certain orders of a federal court, were properly held in civil contempt for that failure when a state statute that assertedly precluded their compliance with the orders had been held unconstitutional before the imposition of fines for contempt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 46a-82a) is reported at 673 F.2d 628. The opinion of the district court (Pet. App. 5a-45a) is reported at 533 F. Supp. 631.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1982, and a petition for rehearing was denied on March 23, 1982. The petition for a writ of certiorari was filed on June 18, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A mentally retarded resident of the Pennhurst State School and Hospital filed this class action against petitioners—several Pennsylvania officials, and the Department of Public Welfare (the state agency with responsibility for operating Pennhurst) —and others, alleging that they had failed to provide the plaintiff class adequate health and training services, in violation of the federal constitution and state and federal statutes. The United States and the Pennsylvania Association for Retarded Citizens (PARC) intervened as plaintiffs. After a lengthy trial, the district court ruled in plaintiffs' favor (446 F. Supp. 1295 E.D. Pa.).[1] On March 17, 1978, the

[1] The legal basis for the petitioners' liability and the appropriateness of the remedy have been the subject of several appeals. The court of appeals affirmed in part the district court's remedial order, relying principally on the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6010 (DDA Act). It remanded the case for further proceedings consistent with its opinion (612 F.2d 84 (1979)). The court of appeals expressly rejected petitioners' claim that appointment of a master was improper (*id.* at 111-112). This Court reversed the DDA Act holding (451 U.S. 1 (1981)), and remanded the case to the court of appeals for consideration of whether some other federal statute, state statute, or the federal constitution would support the court of appeals' judgment. On remand the court of appeals reissued its judgment in its original form after concluding that state law fully supported the relief awarded in this case (673 F.2d 647 (1982)). The court of appeals refused to reconsider petitioners' argument that the appointment of a special master was improper (*id.* at 651).

This Court again granted certiorari to review the court of appeals decision, No. 81-2101. One of the questions presented in that case is "[w]hether it is a proper exercise of judicial power for federal courts to maintain a Special Master and Hearing Master to supervise the decisions of state officials

court entered a remedial order which, inter alia, appointed a special master to supervise the planning and implementation of community living arrangements for qualified residents of Pennhurst.[2] Paragraph 8 of that order provided that (Pet. App. 50a-51a):

> [t]he Master shall engage such staff of his or her own as he or she feels necessary, subject to the approval of the Court. The Master and his or her staff shall be compensated by the commonwealth defendants at a rate to be set by the court; the expenses of the mastership to be borne by the commonwealth defendants.

2. During the fiscal years 1978-79, 1979-80 and 1980-81, the district court issued several payment orders specifying the amounts to be paid the special master and the hearing master (Pet. App. 10a).

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regarding the proper placement of retarded residents under state law." Petitioners do not suggest in their brief on the merits in No. 81-2101, or in their petition here, that this Court's decision on that issue in No. 81-2101 will affect this petition. In any event, there is no reason to hold the petition in this case until the Court reaches its decision in No. 81-2101. If the Court's judgment in No. 81-2101 does affect the validity of the contempt judgment in this case, petitioners can file a motion for relief from the contempt judgment pursuant to Fed. R. Civ. P. 60(b)(5). See *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1343-1348 (3d Cir. 1976); *United States* v. *Spectro Foods Corp.*, 544 F.2d 1175, 1182 (3d Cir. 1976) (civil contempt order cannot stand if the order with which compliance is sought is overturned on appeal).

[2] A hearing master was appointed by order of April 24, 1980, in response to a court of appeals opinion (612 F.2d at 114) requiring an individual hearing for any Pennhurst resident who contended that the living arrangements and services at Pennhurst were more beneficial to his habilitation than those available in the community (Pet. App. 9a).

These costs were paid during those years from general appropriations for State Centers for the Mentally Retarded (*id.* at 55a). In late 1980 or early 1981, the Department of Public Welfare decided to abandon the use of general appropriations and to request a separate appropriation for the operation of the masters' office (*id.* at 55a). Accordingly, the budget request for fiscal year 1981 contained a line item request for $900,000 for the masters' offices.

During testimony before the House Appropriations Committee on this budget request, petitioner O'Bannon, Secretary of the Department of Public Welfare, objected to the masters' offices, calling them "a redundant, ridiculous piece of bureaucracy" (Pet. App. 55a n.12). When asked what would happen to the legislature if the requested $900,000 appropriation were cut, she responded that the legislators had the authority to cut the appropriation and that the district court could not deprive them of the authority (*id.* at 56a). She was also asked what would happen if the legislature did not fund the office of special master, and she replied "[i]f you put no money in this line item, we would continue to pay it as we are presently being ordered to do out of the Pennhurst budget" (*id.* at 58a). The Secretary was then asked what if the legislature "let the line item sit and say thou shall not pay any of Pennhurst's money to the Master?" (*ibid.*). O'Bannon did not respond to this question, but she later expressed doubt as to whether this "technique would work" (*id.* at 59a). O'Bannon subsequently testified before the Senate Appropriations Committee. She again expressed her objections to the masters' offices. When asked what would happen if the legislature failed to appropriate funds for those offices she responded "I think I would be held in contempt" (*id.* at 13a).

The legislature thereupon denied the requested $900,000 appropriation for the masters' offices and instead appropriated, as a line item, $35,000 for the 1981 fiscal year with the following proviso:

> It is the intent of the General Assembly that this appropriation be used for shutdown costs and that no other funds of the Commonwealth be spent for these functions.

(Pet. App. 59a). The law containing this proviso was signed by the Governor on July 1, 1981 (*ibid.*).

3. Meanwhile, on June 4, 1981, the district court signed two orders directing petitioners to pay specific sums, totaling approximately $68,000, for the July 1981 costs of the special master and hearing master on or before July 1, 1981 (Pet. App. 14a). Similar orders were entered on July 14, 1981, for costs covering August 1981. On June 23, 1981, the general counsel for the Department of Public Welfare sent the Department's Comptroller a memorandum advising him not to make payment pursuant to the June 4th orders (*id.* at 60a). On June 29, 1981, the attorney for the Commonwealth informed the district court that the Commonwealth would pay no more than $35,000 for the masters' expenses for the July 1, 1981-June 30, 1982 fiscal year (*ibid.*). Plaintiffs moved to hold petitioners in contempt, and the court held a show cause hearing on that motion on July 24, 1981.[3]

4. On August 25, 1981, the district court entered a memorandum and order finding petitioners Secretary O'Bannon and the Department of Public Welfare in contempt for failing to comply with the court's

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[3] The United States did not participate in the contempt proceeding in the district court, or in this aspect of this case when it was before the court of appeals.

June 4th and July 14th orders (Pet. App. 5a-28a). The court noted that during the contempt hearing, petitioners did not contest the validity of the court's underlying orders; instead, they argued that the Secretary had acted in good faith, but was prevented from paying more than $35,000 for the costs of the masters' offices "by valid legislative enactment" (*id.* at 15a). The court ruled that "good faith" was not a defense to a civil contempt charge (*id.* at 16a), but also concluded that, in any event, Secretary O'Bannon had not acted in good faith (*id.* at 17a). In light of the Secretary's testimony before the legislature, the court concluded that she "in effect suggested that the Committee *not* appropriate money for the Masters" (*ibid.*); therefore she and the Department of Public Welfare "violated their obligation to act diligently and with steadfast purpose to effectuate the Order of this Court" (*id.* at 21a).

The court also rejected the petitioners' argument that the legislative proviso appended to the FY 1981 appropriation for the masters' offices prevented compliance with the court's order. Quoting from *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 695 (1979), the court stated that "a '[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.'" (Pet. App. 22a). The court ruled that "[t]he action of the Pennsylvania legislature cannot and does not preclude compliance by the Commonwealth defendants with the Orders of this Court based upon the United States Constitution and a federal statute." (*id.* at 24a).

The district court entered an order finding the Department of Public Welfare and Secretary O'Bannon in contempt of its orders of June 4, 1981, and

July 14, 1981, requiring them to pay the expenses of the masters (Pet. App. 26a-28a). The order required them to pay a civil fine of $10,000 per day for each day after September 2, 1981, that full payment was not made pursuant to the orders of June 4, 1981, and July 14, 1981 (*id.* at 27a). Justice Brennan temporarily stayed that order on September 3, 1981; on receipt of responses to the application for a stay the temporary stay was vacated on September 17, 1981 (Pet. 8 n.7). On October 5, 1981, the Court denied the application for a stay (454 U.S. 808).

5. The court of appeals, sitting en banc, affirmed the district court's order holding petitioners in contempt (Pet. App. 46a-82a).[4] The court held that the contempt order was appealable, but that the scope of appellate review was severely limited under the circumstances of this case (*id.* at 70a):

> Since the question of whether the action of the Pennsylvania legislature requires a modification of the underlying orders imposing on the Commonwealth the expenses of the Masters offices could have been raised in a Rule 60(b) motion, and we would have appellate jurisdiction over an order granting or denying Rule 60(b) relief, we hold that the effect on the underlying orders of the appropriations act may not be considered in an appeal from a civil contempt order. Any other holding would be an open invitation to any

[4] Chief Judge Seitz dissented on the ground that the contempt order was not appealable (Pet. App. 81a-82a). He apparently abandoned that view on petition for rehearing (*id.* at 90a n.1). Judges Garth and Hunter agreed with the court's conclusion that the contempt order was appealable, but concluded that the order should be reversed because the underlying orders appointing the masters were improper (*id.* at 76a-81a).

party subject to an injunction to resort to self-help whenever in its view some change in the law warranted relief from a judgment.

The court found while a party can raise a "literal physical impossibility of compliance" (the kind of "impossibility" involved in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948)) in defense to a civil contempt citation without first seeking Rule 60(b) relief, the situation is different when, as here, the claim is that a subsequent change in the law makes "compliance illegal though physically possible" (Pet. App. 71a). Particularly "where the contemnor participated in effectuating the change in the law which is alleged to establish a legal impossibility, sound policy does not permit the by-passing of the orderly route to appellate review provided by Rule 60(b)" (*id.* at 71a-72a). Accordingly, the court refused to consider petitioners' claim that the legislative proviso made compliance with the payment orders impossible (*id.* at 74a).

6. On January 8, 1982, the district court entered a memorandum (Pet. App. 29a-43a) and order (*id.* at 44a-45a) purging Secretary O'Bannon and the Department of Public Welfare of contempt and relieving the Commonwealth defendants of their obligation to continue paying a daily fine of $10,000. The court found that the petitioners had not complied with any of the court's payment orders since June 4, 1981, and instead chose to continue paying a civil fine of $10,000 per day, which totalled $1,200,000 at the time the court purged petitioners of contempt (*id.* at 31a-32a). Since the amount collected in fines exceeded the amounts needed for the masters' offices to function during fiscal year 1981, the court considered it "inequitable" to continue the fine (*id.* at 40a). The court applied some of the funds generated by the fines to the

expenses of the master's offices and directed that the remainder be held in an interest-bearing account (*id.* at 45a).

DISCUSSION

Petitioners contend (Pet. 11-17) that the court of appeals erred in requiring them to proceed by way of a motion under Fed. R. Civ. P. 60; they suggest that the court of appeals improperly distinguished *Maggio* v. *Zeitz*, *supra*, on the ground that this case involves a legal barrier to compliance, rather than physical impossibility.

We also find the court of appeals' reasoning unpersuasive. We are aware of no legal basis for requiring petitioners, as a prerequisite to raising impossibility as a defense in the contempt proceeding, to file a Rule 60(b) motion seeking to amend the underlying payment orders. No such requirement is implicit in *Maggio*, where the Court held that a contemnor could offer evidence at a contempt proceeding to demonstrate his current inability to comply with an order requiring him to turn over the assets of a bankrupt corporation to the trustee. The court of appeals' distinction between physical and legal impossibility overlooks the fact that physical impossibility, like legal impossibility, can be brought about by the actions of the contemnor.[6]

Nonetheless, we submit that affirmance of the contempt order was proper. Petitioners were fully capable of complying with the court's orders once the district court ruled that the legislative proviso on which the impossibility claim rested violated the Supremacy Clause. That ruling removed any state law barrier to

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[6] Indeed, this Court apparently contemplated such a situation in *Maggio* itself (333 U.S. at 60, 64).

compliance; it was not disturbed on appeal and is not fairly included in the question presented to this Court in the instant petition (see Pet. i and Sup. Ct. R 21.1). Accordingly, review of that ruling by this Court would be inappropriate, and the premise of the issue petitioners do present to this Court is destroyed.

1. Even if petitioners were not able to comply with the courts' payment orders after July 1, 1981 (the effective date of the disabling legislative proviso), that disability was removed on August 25, 1981, when the district court, relying on several of this Court's decisions involving the Supremacy Clause, ruled that "[t]he action of the Pennsylvania legislature cannot and does not preclude compliance by the Commonwealth defendants with the Orders of this Court" (Pet. App. 24a).[6] This ruling is correct. In *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971), this Court held invalid a state anti-busing statute that the Court found would "inescapably operate to obstruct the remedies granted by the District Court in [*Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971)]." Similarly, here, at the time the district court entered the contempt judgment, the orders appointing the masters rested on "the United States Constitution and a federal statute" (Pet. App. 24a) and on Fed. R. Civ. P. 53. This federal nexus has never been entirely removed, and thus the court's payment orders requiring compensa-

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[6] The district court's order did not contain a declaration to this effect, but the opinion clearly reflects the court's determination of unconstitutionality. Petitioners could have filed a motion requesting clarification of the order if they had any doubt about the effect of the court's decision on the legislative proviso. See *Regal Knitware Co.* v. *National Labor Relations Board*, 324 U.S. 9, 15 (1945).

tion of the masters remain supreme to the extent that they may clash with any state legislative mandate.[7]

Petitioners were afforded ample opportunity to purge themselves of contempt before any fine was imposed and they were fully capable of paying the costs of the masters' offices. After the district court nullified the legislative restriction, petitioners were afforded seven full days, plus an additional 14 days by virtue of this Court's temporary stay of that order, in which to pay approximately $100,000 in costs.[8] The findings below show that petitioners could have used other funds appropriated for Pennhurst to pay these costs. For the three fiscal years prior to fiscal 1981, petitioners had used general appropriations for mental institutions for this purpose (Pet. App. 55a). During testimony before the state legislature, Secretary O'Bannon was asked what would happen if the legislature did not fund the masters' offices. She answered: "If you put no money in this line item, we would continue to pay it as we are presently being ordered to do out of the Pennhurst budget" (*id.* at 58a). Petitioners paid fines totalling $1.2 million from the appropriation for the general administration of the Department of Public Welfare. They state that this was possible because, unlike the funds for the masters' offices, "there was no legislative prohibi-

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[7] In any event, petitioners were purged of contempt on January 8, 1982 (Pet. App. 44a-45a), some six weeks before the court of appeals, on remand from this Court, concluded the relief ordered was warranted because of a violation of state law (673 F.2d 647 (1982)).

[8] The payment orders for July and August 1981, which are the underlying orders petitioners disobeyed, required payment of costs totaling about $135,000. Petitioners paid the $35,000 the legislature appropriated for fiscal 1981 on July 13, 1981 (Pet. App. 31a).

tion on the use of state funds to pay the fines for civil contempt" (Pet. 8 n.8). However, once the district court held the restriction on funds for the masters' offices unconstitutional, that distinction, and petitioners' related impossibility defense, ceased to have any validity.

2. Petitioners cite two state court decisions, *Shapp* v. *Sloan*, 480 Pa. 449, 391 A.2d 595, 602 (Pa. Super. Ct. 1978), appeal dismissed, 440 U.S. 942 (1979), and *Burd* v. *Department of Transportation*, 443 A.2d 1197 (Pa. Commw. Ct. 1982), for the proposition that they cannot spend moneys not appropriated by the legislature (Pet. 12-13). But neither of those cases suggests that petitioners cannot take funds *that have been appropriated* for the operation of a Department to pay the costs of litigation assessed against that Department and its officials.[9] Indeed, petition-

[9] In *Sloan* the executive branch of the state government challenged the legislature's authority to require a specific appropriation of federal funds before they could be expended by state agencies. The court interpreted the state constitution and federal law to permit legislative control over these funds. In *Burd* an intermediate appellate court held that state funds could not be expended to comply with a federal court consent decree in view of a state law that prohibited the expenditure of funds for that purpose. However, the state court noted that the federal court had never been presented with the question of Pennsylvania's legislative authority (443 A.2d at 1201). The court denied a motion for summary judgment aimed at preventing the use of funds for compliance purposes because the questions presented were not "free from doubt."

Petitioners also suggest (Pet. 13) that the result reached in this case is inconsistent with the result reached in *New York State Association for Retarded Children, Inc.* v. *Carey*, 631 F.2d 162 (2d Cir. 1980). The New York state statutes and constitutional provisions involved in that case are quite dissimilar from Pennsylvania's, and there was no evidence in *NYSARC* v. *Carey*, as there is in this case, to show that funds

ers' conduct over the past four fiscal years belies any such interpretation of those decisions.[10]

There was no error in holding the Secretary and the Department of Public Welfare in contempt of court. Therefore, the district court's judgment was properly affirmed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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could be taken from a department's general appropriation to pay court costs. Furthermore, the consent decree in *Carey* only obligated state officials to take action necessary to comply with the decree "within their lawful authority, including the State constitution and applicable State laws, and subject to any legislative approval that may be required" (631 F.2d at 163).

[10] While we believe the record conclusively shows that it was possible for petitioners to comply with the payment orders before any fines were levied, at the very least petitioners did not meet their burden of persuading the district court that compliance was impossible. In its memorandum of January 8, 1982, the court stated that it "had not been persuaded that the Commonwealth defendants have been totally without funds sufficient to comply with the Court's Orders" (Pet. App. 37a-38a).

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